choices

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Canada's Options in North America

See You in Washington?

A Pluralist Perspective on North American Institutions

Robert Wolfe

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Canada's Options in North America
Les Choix du Canada en Amérique du Nord

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The ongoing process of economic integration between Canada, the United States and Mexico raises important issues of economic policy and governance. The security concerns that have gained prominence since September 11, 2001 have been superimposed on these issues. Many whose livelihood depends on effective trade and investment links between the two countries favour not only streamlining the border by addressing security concerns, but also the pursuit of even more dynamic integration than that brought by trade agreements such as the FTA and NAFTA. However, both the requirements of more secure US borders and deepening economic linkages raise concerns about Canada's room for manoeuver on a wide range of policy fronts. Studies in this series will explore the options and tradeoffs available to Canada, at the strategic level and with respect to some key issues concerning North American integration.

L'intégration économique entre le Canada, les États-Unis et le Mexique soulève d'importantes questions de politique économique et de gouvernance, et depuis les événements du 11 septembre 2001, la sécurité s'est ajoutée à ces préoccupations. Parmi ceux dont le gagne-pain repose sur l'existence de forts liens commerciaux et financiers entre les deux pays, ils sont nombreux à favoriser non seulement une plus grande efficacité des formalités frontalières par le règlement des problèmes de sécurité, mais également une intégration encore plus poussée que celle découlant des accords commerciaux en vigueur tel l'Accord de libre-échange canado-américain et l'Accord de libre-échange nord-américain. Toutefois, plusieurs autres craignent que la poursuite de ces deux objectifs d'une frontière plus sûre et de liens économiques plus étroits ne mettent en péril la capacité du Canada de relever plusieurs défis. Cette série d'études examinera les options et les compromis qui s'offrent au Canada en ce qui concerne l'intégration nord-américaine, aussi bien sur le plan de la stratégie d'ensemble que sur certaines questions-clés.

CANADA'S OPTIONS IN NORTH AMERICA
LES CHOIX DU CANADA EN AMÉRIQUE DU NORD

See You in Washington?

A Pluralist Perspective on North American Institutions

Robert Wolfe

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Introduction

It is Canada's privilege to be condemned to share a continent with the United States of America, but this geographic and economic reality does not have deterministic political implications. We make our institutions, even if we cannot choose our neighbours. Canadians strive to grasp the opportunities of participating in the vast US market, and we are tempted by the vibrant spectacle of their cultural life, although we worry about our own distinctiveness. We depend on the Americans' help for the defence of our common continent while worrying about being dragged into their foreign conflicts. Since the eighteenth century, Canada and the United States have been drafting treaties and creating organizations to manage the complexities of this relationship. In the aftermath of the shock of 9/11, however, those Canadians who look for clarity and certainty are worried about the apparent weaknesses of North American institutions. Canada is more dependent on the United States than ever before, it seems, but Americans are less interested than ever in taking account of other countries' views, and we have no institutional mechanisms that can override this apparent deafness.

I have a simple argument. If Canada and the United States had a strong common institution, it would be located in Washington. Canada exists because we have not wanted to look to Washington as the locus of collective decision. Unless Canadians have changed their minds – if we still do not wish to see the Americans only in their capital – we should not now seek a new, stronger institution. Instead, we should seek both to recognize and to build on the robust institutions we already share.

The grand schemes that have been attracting considerable elite attention in recent months are usually

based on the idea that more North American integration is needed, and that Canada can get inside the "perimeter" only if it puts enough on the table to get the United States' attention. Proponents appear to believe that we can deal with the United States only by concentrating all aspects of our relations with that country in one centralist framework. I argue, however, that Canadians should calm down. Canadians and Americans have a long history of successfully working together to address the sorts of economic and security problems that seem especially preoccupying at the moment. Existing institutions suit both countries.

Canada faces new economic and security challenges in the changed circumstances of post–9/11 North America, but institutions are not merely instrumental tools to a given end. Canada's institutional options depend, as always, on the kind of country we wish to create. Canada remains a separate political community because Canadians wish to maintain their distinctive institutions, which include two legal systems as well as two languages. Canadians are not keen on further institutional integration, or so it seems from survey research. Canadians are opposed to harmonization on just about everything that could be understood to be connected to the domestic welfare state, for example (Mendelsohn et al. 2002), although they are comfortable with such things as stronger border policies and increased military integration (short of automatically going to war whenever the United States does). Canadians want to retain a real border. So do Americans. They are unlikely to respond favourably in the improbable event that Canadians asked for seats in Congress. They are also unlikely to exempt Canadian firms from the normal legal harassment suffered by anyone doing business in the United States.

Institutions are hard to see, especially when they do not assume formal shape. In this paper, I use metaphors to clarify my claim that, rather than being weak, robust North American institutions exist in a strong constitutional framework. One can see the conventional framework in the symbolism of photographers' using the Ambassador Bridge between Detroit and Windsor as background for the signing of the Smart Border Accord by the US president and the Canadian prime minister in September 2002. With the soaring bridge in mind, it is possible to dream of creating an overarching constitution in which the relations of Canadians and Americans can be subsumed in a strong state-to-state framework with a single set of coherent policy tools. This concrete framework is, however, a misleading image of our shared future.

Instead, I suggest three *pluralist metaphors*. Imagine, to represent the constitution of North America, not a bridge but a *kaleidoscope*, with its constantly shifting shapes and colours, just like our shared institutions. In contrast to two leaders solving all policy problems, imagine a *Swiss Army knife*: not a single tool nor even the same tool for every person, but a collection of tools infinitely adaptable to the purposes of millions of users. It follows that the important legal texts are not to be found in one comprehensive treaty. So, for the third metaphor, imagine a *fridge door*, on which is posted all the relevant textual evidence of our mutual commitments for all to see and for all to act on as they see fit, like the dozens of sub-agreements of varying explicitness that actually make up the Smart Border Accord. In short, rather than seeing North American institutions only in Washington or only on an ambassadorial bridge from Washington to Ottawa, we can see them everywhere.

In Part 1 of this paper, I describe the problem we seem to face and sketch the current concerns about North American institutions. In Part 2, I suggest a theoretical alternative that I test against the institutions we have now. The conclusion in Part 3 offers some policy implications.

Part 1: What Is the Problem?

Institutions arise as a consequence of human interaction. In the case of Canada and the United States, two countries that are highly integrated in terms of their economies, culture, and even blood relations, those interactions have led to the creation of myriad North American institutions. Looking at trade alone, the links between the two countries are represented by numbers that are not only impressively large in absolute terms, but also relatively significant. Trade with Canada matters for the United States. Canada is the biggest trading partner for the country as a whole and for more than two-thirds of the individual states. That trade, however, represents only 2 percent of US gross domestic product (GDP). Bilateral trade matters a lot more for Canada, which saw its exports to the United States more than double during the 1990s to 37.6 percent of GDP, even as the relative importance of interprovincial trade declined to barely half that of north-south trade (Courchene 2003, table 1). The US market is now more important for Canadians than

their own internal market." Work on the implications of the declining salience of east-west integration in this country has barely begun, but in this paper the focus is on what we should do about north-south links, where Canada faces two possibilities. Some people, notably the trade minister (Pettigrew 2002), think that Canada should be able to obtain an even larger share of the US market. Others worry that Canada might not be able to maintain the share it has now.

Both the hopes and the fears have closely related institutional implications. What, for example, would Canada need to increase its share of the US market? Most lists include more liberalization, which these days implies more regulatory harmonization. Yet John Helliwell, one of Canada's most distinguished economists, is skeptical that the opportunities exist and dubious about the cost. Growth in Canadian and US trade will come not from each other but from developing countries, he says. If North America's share of global markets is declining, and with it Canadian export opportunities in the continent, then efforts to increase policy harmonization between Canada and the United States would have a low payoff. Helliwell also argues that further increases in trade densities among the advanced economies are unlikely to increase income, that intra-industry trade that increases consumers' choice does not necessarily increase their sense of well-being, and that people value such things as health, education and social capital over increases in income. It follows that attempts to increase free trade at the expense of the infrastructure of the administrative state and of local civil society organizations would not necessarily increase Canadians' sense of well-being (Helliwell 2002, 85).

Yet, even if Helliwell is correct and further integration is not worth pursuing, Canadians and Americans share a continent, are integrated, and that has implications. Canadians want true most-favoured-nation access to the US market. We do not want Mexico or the European Union or any other US trading partner to have better access than Canada has. We want the same access to their market as they have to ours, and we want to ensure that the border does not unduly affect investment decisions. These desires lead to six legitimate worries about the status quo.

First, no one should underestimate how obsessed Americans now are with security. Senator Hilary Clinton's foolishness at the beginning of 2003 in warning about the five phantom terror suspects who supposedly entered across the "lax" northern border is just one example of that obsession. The truth is that Canada and the United States have been cooperating in the defence of North America both abroad, in organizations such as NATO, and at home, in NORAD, for decades. Now, however, the existing institutions need to be adapted to address US concerns about ballistic missile threats from rogue states and terrorists that can strike their large cities.

Second, in economic terms, 9/11 was a reminder of how susceptible the border is to sudden slowdowns or even closure and how quickly the whole Canadian economy would feel the impact of a sustained disruption. In the nineteenth century, migrants easily flowed both ways across the world's longest undefended border; in recent decades, however, the border has become less porous. In the 1990s, for example, the United States introduced new rules aimed at controlling its border with Mexico, but those rules have sideswiped Canada as well (Sands 2002). Indeed, even before 9/11, Canadian academics and officials were starting to rethink the border (see, for example, Hampson and Molot 2000; Canada 2000), and the trade minister was already talking about the negative consequences of border delays for companies with integrated "just in time" supply chains (Pettigrew 2001). Clearly, economic prosperity and "homeland security" are linked at the border.

A third worry is that greater integration with the United States would leave Canadian exports increasingly susceptible to harassment under US "trade remedies" with respect to subsidies and dumping, as the softwood lumber industry knows all too well. A fourth worry is that increasing integration highlights the differences in the two countries' regulatory frameworks, which are particularly significant for cross-border transactions, and that this exposure would put pressure on Canada to jettison regulations and administrative procedures that are viewed as needlessly diminishing economic opportunities. A fifth worry is the asymmetry in the two countries' resources: Americans worry about access to supply (energy), while Canadians worry about access to markets (lumber).

All of these concerns have an institutional dimension, which leads to a sixth worry: that North American integration is outstripping shared institutions. Post-9/11, this worry is manifested in several schools of thought. Some people can be described as *fearful nationalists*, a term used pejoratively for those who are nostalgic for an imagined past of true sovereignty and autonomy. Other people want to *manage integration* by working within the North

American Free Trade Agreement (NAFTA) logic to the next plateau. A third approach is that of *aggressive incrementalism*, which describes advocates of a "Grand Bargain" or a "Big Idea." These people argue that, since the United States tends to ignore Canada, Canadians have scope to define an issue by seizing the initiative. In contrast, "*What, me worry?*" types argue that the relationship has always been complex and that attempts to create central institutions will always fail, so let's muddle through. Finally, *wishful thinkers* believe that we can create whatever common institutions we like if we try hard enough.

These caricatures are not new. The clash between economic nationalists and continental integrationists on how best to promote growth in Canada while maintaining a distinctive community has a long history (see Nossal 1985). Opinion also differs on diplomatic strategy. For example, Canadian governments after World War Two often sought to pursue issues with the United States in multilateral forums in which Canada's relative weakness could be mitigated by acting in good company with allies.[1] At the same time, Canadian officials have also made use of informal institutions and claims to special status rather than trying to create formal, binding links (Cooper 1997, 248). Institutions are places in which to study, discuss, monitor and co-ordinate. Less often are they places in which to collaborate on joint actions and settle disputes. Some of these things are easier to do than others; some are comparatively rarely achieved in international life generally; all are part of what we look for when we worry about North American institutions.

The Big Ideas

Canadians often seem pre-occupied with their relations with the United States (see Hoberg 2000; Leblanc 2000), but the elite interest in grand schemes has recently accelerated in the face of the six worries enumerated above. Perhaps the best-articulated "Big Idea" comes from Wendy Dobson (2002), but it is joined by proposals for a single seamless market (Hart and Dymond 2001), "legal integration" (Gotlieb 2002), a common currency (Courchene 1999), a "new partnership" (d'Aquino 2003), a North American "community" (Wirth 1996; Pastor 2001) and a constitution or treaty for North America (Segal 2002). "NAFTA-plus" and the other grand schemes do not, however, strike a chord with politicians in Ottawa. As the trade minister put it, "Now many in the business community have been calling for a strategic or a grand bargain with the US. Others have called for a common market or a customs union. While there is always room for a healthy debate, and I encourage it, I do not think there is currently an appetite for such a grand scheme" (Pettigrew 2002). But politicians nonetheless would love to restrain the United States' use of trade remedy laws.

The common analytic basis of all these "Big Ideas" is that the institutional status quo is not working. As Tom d'Aquino (2003) puts it:

> The reality ... is that the economic institutions that guide the flow of commerce between Canada and the United States are inadequate. The Canada-United States Free Trade Agreement, and its NAFTA successor, have not reconciled dysfunctional differences in laws and regulations nor constrained the power of special interests to interfere in the economic relationship.

Differences in laws and regulations that arise from differing democratic decisions are hardly dysfunctional, and it is not a criticism of bilateral institutions to argue that they have done no better (or worse) than national institutions in constraining special interests, but d'Aquino articulates a widespread perception. The grand schemes also share a number of common suggestions for trilateral institutions, perhaps on the EU model, for more regulatory co-operation, and, most important, for enhanced dispute settlement mechanisms.

Trilateralism

The trilateral idea is associated with Vicente Fox, the president of Mexico, who has energetically pursued the goal of North American integration. He has called on his US and Canadian counterparts to consider transforming NAFTA from a free trade area into a common market and to consider working toward the longer-term goal of "open borders," for people as well as for goods, among the three countries. He has not had an enthusiastic response from the Americans, but when might it suit Canadians to include Mexico in "North America"?

The problem is that Canada is not particularly integrated with Mexico on any measure of movement of goods, services, people or ideas, nor is this reality likely to change soon. Accordingly, this low level of integration will not support more sophisticated trilateral institutions. Canada should no doubt cultivate its relations with Mexico, where there may well be much more relative potential for growth in trade than with the United States, but, from Canada's perspective, trilateral institutions (as opposed to working with Mexico in bilateral and multilateral forums) would only complicate our relations with the United States, especially on border and immigration issues. The rationale for expanding

the Canada-US FTA to NAFTA still holds. Canada wanted to avoid hub-and-spoke regional trade deals, and on the occasions when the US Congress sees an issue involving Mexico and Canada in similar ways, the two countries can pool their markets and negotiating assets. It follows that Canada will sometimes have interests in Mexico that can be pooled with those of the United States. But opportunities for true trilateral institutions will be rare.

I am generally dubious about the EU as a model for trilateralism. North America is not Europe, and creating institutions on the EU model would be impossible (Nossal 1998, 472–75). Integration has worked in the EU to the extent that its citizens share political objectives. The aim of ever-deeper integration was, and perhaps still is, to ensure that Germany is so embedded in a broader Europe that catastrophic wars will never happen again. After 50 years, yet another EU constitutional convention is now at work trying to get it right. Canadians, however, have never been keen on policy-led integration with the United States, but as consumers and producers we are enthusiastic participants in market-driven integration. It is the policy implications of that process that merit our attention.

In one widely cited study, Robert Pastor extends the trilateralist idea to the limit by positing several reasons for deepening NAFTA (2001, 16–18). In my view, however, his reasons are insufficient. Canada-US *immigration co-operation* is longstanding and has recently been deepened by the Smart Borders effort, but US-Mexico co-operation is an entirely a different order of problem. A *common transport policy* for three huge and geographically diverse countries is improbable, although closer consultations would be of value for rail, pipeline, air and road networks, allowing the partners to go beyond border policy to look at the efficient movement of people and goods in the integrated economic space. I think his idea of *a common approach to foreign policy* is naive, as shown by the conflictual attitudes toward Cuba, the example he chooses. Canada's room to manoeuver on foreign policy has been limited at least since the Washington Treaty of 1871 (see Brebner 1945), but even in the EU a common foreign policy remains a dream, as disarray over Iraq shows. A proposal for a *common currency* is doomed by visceral Canadian hostility and a lack of elite consensus. Hellwell dismisses the idea, saying that Canada's lower inflation rate and reasonable expectations that it will stay below US levels limit potential gains. The EU does not provide an example for a larger currency area in North America — there is more fiscal redistribution (which is one way to manage shocks) of all sorts between Canadian provinces than there is within the EU, but there is more within the EU than there is between Canada and the United States, let alone between Canada and Mexico. The European Central Bank is a familiar kind of institution in Europe, but no such institution could be created in North America. Under a common currency, US Federal Reserve monetary policy would target US inflation and unemployment without regard for Canada and with no intention of giving this country a voice. In short, for Canada, a common North American currency would amount to a unilateral transfer of sovereignty (Hellwell 2002, 67–69).

Regulatory Co-operation

A worry about regulatory differences between Canada and the United States is not new, but it is a consistent theme in all proposals for institutional adaptation, including those emanating from the Canadian federal government. The implicit assumption is that "regulatory reform" is, by definition, a good thing, as if regulations are always a burden to be reduced, and as if the only role of government is to support the market. But regulation, broadly defined, is about institutions providing those that allow the market to function (for example, property rights), while preserving those that are essential to a sense of community (for example, language and culture).

Regulation should be understood as linked sets of policies that countries use to achieve collective objectives of greater wealth and enhanced social cohesion. Regulation as a function is a constant; only the form changes. Recent decades have seen a simultaneous expansion of the "public" domain, in the sense of the demands citizens place on government, and a trend to privatization of state assets. The result is that states have more public purposes to fulfill, which they accomplish increasingly through regulation, and which, in turn, leads to increases in regulatory friction between governments.[4]

Current proposals make much of the need for less duplication of regulatory effort and greater acceptance that authorities in each country are regulating in an appropriate manner. If countries had identical regulatory objectives, institutions and democratic processes, then the substance and form of their regulations would be identical, and authorities in one could easily recognize the rules of the other. Since

the reality is otherwise, the common approach to avoiding duplication and regulatory conflict has been to attempt to negotiate mutual recognition agreements (MRAs) between countries. This mutual recognition or "interoperability" (Schwanen 2001), an attractive term in a pluralist framework, is thought to be straightforward. It is not. The mutual recognition technique works when countries (or provinces!) see themselves and their policy choices as similar and when they are prepared to accept a degree of institutional competition among their policies (Kahler 1996, 331). Mutual recognition is first the recognition by the entities of each other. It is a familiar idea in political theory and in discussions of religious tolerance. If such basic mutual recognition does not exist, however, then the more trivial mutual recognition of technical standards is not possible. Such recognition is based on trust and on the belief that the other will regulate as we do – in other words, on "we feeling." Yet even among countries in which the basic requirements are met, negotiators quickly discover that technical difficulties make an MRA hard to negotiate, and few have been concluded.

The MRA concept is based on the assumption that regulatory conflict can be avoided by the development of shared rules. In the North American context, however, do Canadians need to be involved at a deeper level – to be able to influence the regulator? In other words, do we need not shared rules, but shared administration of the rules? In a merger involving a large Canadian and a large US company, whose rules would be definitive? Would the US authorities regard Canada simply as part of the relevant market for measuring market concentration? If the deal were disallowed in response to US purposes, would Canadians think their concerns had been ignored? Or would the relevant authorities on both sides of the border work together? Take the example of the proposed deal between Canadian National and the Burlington Northern Santa Fe Railway. When the merger was announced, approval of the US Surface Transportation Board was required. Surprised by the scope and scale of the combination, the board declared a 16-month moratorium until it could revise the rules governing such a merger. This delay, on top of the usual delays in the regulatory process, caused CN to withdraw, which perhaps was the US intent. It is not clear how efforts to reduce duplication of regulatory effort could eliminate such competition policy problems. Antitrust is an intensely political issue in the United States, and Canadians do not get to vote for the politicians concerned, who, in any case, are not likely to relinquish their authority.

Some regulatory difficulties are specific to the Canada–US relationship, but many others are on the World Trade Organization (WTO) agenda. An inventory of these sorts of issues would reveal that the United States is the largest source of Canada's problems, but we are not theirs. Are we even on their radar? If we are to judge the pre-occupations of the US trade policy community from reports in *Inside U.S. Trade*, a major industry publication, Canada looms large in the US trade imagination. Many of the stories concern developments in Canadian policy, the results of disputes and actions in the WTO involving or affecting Canada. NAFTA figures rarely, and mostly in terms of investment issues under Chapter 11. When the stories are forward-looking, they concern Canada's part in new negotiations, mostly in the WTO but sometimes in the proposed Free Trade Area of the Americas, although the section of *Inside U.S. Trade*'s Web site devoted to "The Americas" looks south, not north.

The reality is that bilateral negotiations will always be problematic on all "behind the border" issues where the barrier to entry is not a tariff at the border but a domestic regulation. Canada has a general interest in how the United States manages its markets, notably in the closely related domains of trade remedy and competition policy. But Canada faces difficulties in asking for policy changes when the policies in question are more significant for other US trading partners. In contrast, the United States has specific interests in how Canada manages certain sectors, even though differences in these sectors (for example, softwood lumber) often reflect different philosophies in the two countries about the role of the state. In consequence, when Canada proposes comprehensive deals that would engage the management of the market generally, it is hard to stimulate much US interest. It is difficult for Canada to negotiate exemptions when we take only 18 percent of US exports, representing a mere 2 percent of that country's GDP. Does it matter, then, whether we address technical standards or domestic regulation of services in a North American, as opposed to a WTO, context?

Dispute Settlement

The strongest common element in Canadian frustration with the institutional status quo is what happens when Canada and the United States get involved in trade disputes. Is it possible to develop a better dispute settlement system? A major component of the Big Ideas is the size of the bribe Canada has to offer the US

Congress for it to let the courts settle such disputes. Last fall, Allan Gotlieb, a former ambassador to Washington, wrote:

> Rather than eschewing further integration with the United States, shouldn't we be building on NAFTA to create new rules, new tribunals, new institutions to secure our trade? Wouldn't this "legal integration" be superior to ad hoc responses and largely ineffective fobbying to prevent harm from Congressional protectionist sorties? Wouldn't our economic security be enhanced by establishing a single North American competitive market without anti-dumping and countervail rules? Are there not elements of a grand bargain to be struck, combining North American economic, defence and security arrangements within a common perimeter? (Gotlieb 2002, 120)

The same concerns were evident in some of the key recommendations of the House of Commons committee report on North American integration (Canada 2002). In its Recommendation 15, for example, the committee suggested that "Wherever possible, trade disputes should be addressed through rules-based, institutional mechanisms, and the Government should use its best efforts to improve and expand such mechanisms on a continental basis" (284). In Recommendation 16, it suggested that interpretive decisions under Chapter 20 of NAFTA "should be made automatically legally binding" (285), a strange view for members of Parliament to take, since the democratic accountability of trade panels is dubious at best. The committee rightly rejected attempts to link trade disputes, but it accepted the idea that "a rules-based framework" would make life easier for us. Finally, it suggested (Recommendation 24) that "the Government of Canada should initiate discussions with Mexico and the United States on the feasibility of developing a permanent North American court on trade and investment that would consolidate the existing NAFTA dispute settlement processes under a single trinational juridical body" (286).

I am not sure what these proposals could achieve. The problem is not that the existing system is bad, but that it does not restrain the United States' capricious use of trade remedy laws. The NAFTA agreement established formal dispute mechanisms for investor-state disputes (Chapter 11), for binational reviews of trade remedy determinations (Chapter 19) and for interpreting the agreement (Chapter 20). The system is similar to that of the WTO, which also applies to Canada-US trade, but it is perhaps less legalistic (Marceau 1997).[4] Chapter 20 is little used, perhaps because the WTO procedures are more useful; the chapter is inherently more subject to diplomacy and therefore more likely to lead to outcomes that reflect the uneven bilateral balance of power. In the NAFTA negotiations, Canada had wanted something stronger, but the United States resisted; this resistance is unlikely to change in future (see Loungnarath and Stehly 2000). *The importance of Chapter 11 has been* marginal, if controversial. The vast majority of NAFTA disputes, however, are filed under Chapter 19. The procedure has been useful for resolving routine cases, but not the more contentious ones, such as softwood lumber (see Howse 1998; Gagné 2000, 89–90). Going farther would require greater legal integration of the two countries than NAFTA envisages (Jones 2000), and improvement would require both a new competition policy and a new subsidy regime, neither of which is likely (Davey 1996). As a recent study of NAFTA dispute settlement concludes (Macrory 2002), existing NAFTA procedures work reasonably well, but Canadians would be naive to think they can further constrain US trade-remedy rules bilaterally.

Trade remedy is one of the most sensitive issues in US trade politics, as we saw during the debates in 2001 on giving the president trade promotion, or "fast track," authority. Former Canadian ambassador Allan Gotlieb wrote the book on dealing with the US Congress (see the discussion below), but he overlooks his own conclusions in calling for legal integration. US politicians will never accept the authority of an international judicial process to rule on the fairness of US trade remedy laws. When a WTO panel recently ruled that one element of the system, the so-called Byrd Amendment, was not legitimate under WTO rules, a majority of the US Senate rushed to defend the measure in public. *Political* integration is the only way Canada can, in the foreseeable future, avoid being subject to trade remedy actions when private actors in the United States wish to use the mechanisms Congress has provided for challenging foreign subsidies and dumping.

In summary, all of the Big Ideas are based on two questionable assumptions: an empirical observation that the status quo is not working, and a centralist belief that Canada-US relations must be viewed within a single framework. In the next section, I suggest a pluralist framework based on a series of metaphors. I then use this framework to show why current institutions are robust.

Part 2: Pluralist Metaphors for North America

All the Big Ideas assume that Canada can build a hammer big enough to crack the trade remedy nut. In my view, however, what is needed is not a hammer but a more subtle policy tool that can be adapted to a variety of purposes. To that end, in this section I suggest a pluralist alternative to the seductive centralism of the legal integration of the two countries.

My alternative view of law and governance is rooted in two complementary literatures: *implicit and interactional law* in the legal process theory of Lon Fuller, and *legal pluralism* in the work of Roderick Macdonald.[5] Legal pluralism is a way to move the state out of the centre of the frame, to develop a view of politics that recognizes not merely a multiplicity of issue-areas, but also the multiple sources of authority that operate simultaneously. The import of the legal pluralism hypothesis is obvious within both a federal state, where national, provincial and municipal governments claim authority, and the administrative state, where legislatures, tribunals, courts, administrative agencies and even political parties have degrees of simultaneous, legitimate authority within the same domains. It should be equally obvious that various formal and informal institutions, from firms through standards-setting bodies to charitable organizations, share governance roles with government bodies.

The standard view of institutions makes three assumptions that are, respectively, centralist, positivist and monist (Macdonald 1998). Some analysts do not adopt all three, but the assumptions are usually found together. The *centralist* assumption is that states are the only relevant actors and are the sources of all law. The *positivist* assumption is that the text of a formal agreement is the law; nothing else counts as legal. The *monist* assumption is that agreements made by states are the whole of the universe, as if other sites of normative authority have no purchase. We can see these assumptions in arguments that the North American relationship is defined by the governments (centralism), that the written treaty is the only expression of the relationship (positivism), and that we are in trouble because no formal institution is in charge (monism).

This kind of thinking has implications both for analysts and for the subsequent perceptions of participants. When analysts begin to think that all regulatory decisions are taken in one place and in one form, they allow dispute settlement to obscure the rest of the trade policy universe. When governments think this way, they fail to exploit other institutional forms. When civil society organizations follow this course, they worry that trade tribunals cannot make appropriate environmental and social decisions without being more open and transparent.

The model for a pluralist alternative to such thinking should be able to imagine how citizens can make their own choices without thereby negating the possibility that others will want to make different choices. It depends on an image of law as channeling self-directed human interaction rather than as coercing self-interested individuals. I think that these themes are increasingly apparent in the political life of the advanced economies – in this sense, activist concerns about globalization are a manifestation of a general concern about transparency and participation in collective life. Instead of the overarching bridge, my model is elaborated through three pluralist metaphors: the fridge door, the kaleidoscope, and the Swiss Army knife.

Fridge Door Law

The conventional metaphor for positivist law is the unitary statute book, in which all of the state's codified explicit legislation is collected. The role of an international organization then is to contribute to a harmonization and codification of explicit law. In contrast, the pluralist metaphor of the legal framework is the typical North American family's fridge door, on which everyone posts documents that have normative weight, from a note saying when a child will be home to rules for when the garbage is to be put out for collection. Understanding the injunction of the fridge door differs from reliance on the statute book, yet the fridge door may be a better metaphor for how law actually shapes everyday life (Macdonald 2001). In this context, explicit NAFTA documents have a place, and their formality can be useful as an indication of what those who were responsible for them thought were important, but other texts also compete for influence.

The positivist assumption is that "law" is the explicit unitary expression of the sovereign's will, whether the "sovereign" is a solitary ruler or "the people," whereas the fridge door metaphor sees law as a plural social creation. The metaphor is rooted in Fuller's idea that law is the way in which we create and monitor social order. In opposition to the positivist attention to texts or to formal "sources" of law, Fuller defines law as "the

enterprise of subjecting human conduct to the governance of rules" (1969, 106). He rejects defining law by its tools (for example, courts) or by its results (for example, order), and he dismisses the assumption that we can know law by its use of coercion or force. Viewed as "guidelines for behaviour," law is a form of prospective ordering, not merely retrospective adjudication. Pluralists think that contracts and treaties often furnish a kind of framework for an ongoing relationship, rather than a precise definition of that relationship. Under NAFTA, then, law serves to guide members' relations with each other, to make it possible for them to interpret behavior. The institutional implication of this view of texts is that a court is not necessarily a central institution for law: as "a *social* process of decision" (Fuller 1963, 41) a court is good for some things and not others. Participation in adjudication as a social process of decision depends on the presentation of proofs and reasoned arguments (Fuller 1981, 91, 93), a form of participation that serves some ends but not others. When the only institution we can imagine is adjudication, we limit the way in which we can understand the problem, the scope of participation and the types of possible outcome.

Courts have high thresholds for allowing issues to be brought before them; their independence and small numbers limit the range of issues they can or will hear; and their formality raises the costs of participation, especially information costs. Komesar (1994, 128–37) shows that the nature of the stakes affects what sorts of issues are likely to be adjudicated and why. Most public goods issues, for example, are excluded from litigation because the highly dispersed interests associated with public goods reduce the profitability of litigation. In contrast, when the stakes are high and concentrated, as with many private goods, participants can often resolve the problem in the market. Komesar, therefore, does not agree that adjudication is necessarily any more efficiency enhancing than legislation because some decisions cannot be handled by one or another process. Courts can resolve only matters that are brought to them, and what is brought to them (the Canada-US softwood lumber battle, for example) will often be skewed to losses incurred by a concentrated minority (US loggers) not to diffuse gains by a majority (US home buyers). Indeed, judicial review is more likely to defend minorities from majorities than the other way around. "Rules versus power" is a truncated understanding of the institutional choices facing states in the trading system, as if diplomacy is always dominated by power but rules never are. As Komesar shows, institutional deficiencies can move together. A small country gains nothing by seeing a problem with the United States as a "dispute" if it cannot afford legal advice and has no leverage to induce compliance. That is, if power or money is present in one institutional setting, it might be in another, too.

In sum, the NAFTA texts work well, although they do not work alone, in guiding the interactions of millions of traders, but Canada's difficulties with the US Congress in the realm of trade remedies cannot be solved by creating a better court.

The Kaleidoscopic North American Constitution

The implication of my pluralist alternative is that North America already has a constitution. Unlike the overarching bridge, this constitution is constantly shifting shapes and colours, like a kaleidoscope. It is easier to begin by describing what this framework contains than by attempting to define its constitutive principles. What it contains, and what it thereby constitutes, is the multitude of North American institutions, and it has been evolving for a long time.

From the Canadian perspective, obtaining more secure access to the US market has been a concern for more than a century and half, beginning with worries about Canada's loss of preferences in the UK market following the repeal of the Navigation Acts in the 1840s. This recurrent concern has always been accompanied by worries about the institutional arrangements and their implications for sovereignty and autonomy.

The problem of finding institutional means for managing Canada-US relations pre-dates the country itself, going back at least to the Jay Treaty of 1794, which President Washington had trouble getting through Congress (see Nossal 1982, n.2).[9] Early in the twentieth century, the two countries began to create commissions to manage common problems: the International Joint Commission (1909), the International Fisheries Commission and the International Boundary Commission (1908) were all created before the Canadian legation in Washington was opened in 1927. Later came the Permanent Joint Board on Defence (1940), the North American Air Defence Command (NORAD, 1958) and many less well known committees, including the Ministerial Committee on Trade and Economic Affairs (1953) and the Trade Statistics Committee (1971).[10]

NAFTA is now the most obvious North American institution. In addition to a dispute settlement system, nearly 60 bodies, covering everything from antidumping to road signs, have been created as a result of the treaty, including the Free Trade Commission, the Commission for Labor Cooperation, the North American Agreement on Labor Cooperation, the North American Commission for Environmental Cooperation, the Border Environment Cooperation Commission and the North American Development Bank (see, for example, Commission for Environmental Cooperation 1997, appendix A). In addition, regulatory co-operation is ongoing in bodies that do not necessarily depend on NAFTA, in areas such as civil aviation safety, biotechnology, pesticide registration, information on new industrial chemicals and harmonization of land transport standards (with respect to tire safety recognition, for example) (see Pettigrew 2002).

Many other North American organizations are less obvious. The cross-border crime forum deals with law enforcement on an agency-to-agency basis, building the trust on which the 2001 Smart Border Accord rests. Canadian provinces are members of many US state associations, and states and provinces have joint meetings. The North American Energy Working Group, a group of senior energy officials from Canada, the United States and Mexico, works to "foster communication and cooperation among the three countries on energy-related matters of common interest, and to enhance North American energy trade and interconnections, consistent with the goal of sustainable development, while respecting the domestic policies, divisions of jurisdictional authority and existing trade obligations of each country." The group's most recent report is an overview of federal regulations in Canada, Mexico and the United States for authorizing the construction and operation of international power lines, as well as electricity exports and imports (North American Energy Working Group 2002).

Hundreds of treaties, arrangements and understandings govern aspects of the Canada-US relationship. Indeed, no one knows just how many there are, though one source counted approximately 270 treaties and agreements (including ongoing bilateral institutions) in force between the two countries as of 2002.[11] Allan Gotlieb has tried over the years to pin down all the various linkages, beginning with formal agreements (Gotlieb 1968). But the more he looked – for example, in just the domain of telecommunications – the more he found informal agreements between regulators that got the job done, arrangements of which the central authorities knew little (Gotlieb 1991, 119). Legal pluralists are not surprised that the law that seems to provide guidelines for actors arises in their interaction and that this law is effective even without formal sanction. Gotlieb concludes:

> What is actually recorded in memoranda of understanding, exchanges of letters, minutes, and technical documents represents but a drop in the ocean of informal trans-border contacts that have been taking place for many years. The reality is that, at any given time, there are thousands of points of functional contact at all levels of government operations at the federal level. There is a similar phenomenon occurring in various ways at the provincial level with officials of neighbouring states.

And other levels of state-to-state contact simply reflect interactions among citizens, who cross the border 200 million times a year. In so doing, their interaction creates and maintains the mutual expectations that are the real basis for law.

The various formal and informal agreements and working bodies that exist in most domains of modern government – and not just in North America; see Slaughter (2000) – have little formal structure and no dispute resolution mechanism. Even the Auto Pact of 1965 calls for no more than consultation in case of disagreement (Fried 1989, 15–16). The NAFTA dispute settlement mechanism, therefore, far from being the sum of the Canada-US relationship, is actually slightly beside the point. The real issue is dispute avoidance, and that requires agreement on the substance of rules, not the elaboration of dispute settlement mechanisms (Fried 1994). When countries substantively agree, they usually act consistently with their obligations; when they cannot agree on the substance, dispute settlement mechanisms have little success in promoting either compliance or enforcement.

To the list of intergovernmental institutions, one could add the many other organizations that constitute North American life, from the thousands of firms that have integrated their operations across borders to the myriad standards-setting bodies that affect industrial and commercial practices. Many Canadians belong to "international" trade unions. Family ties spread social norms. TV signals and the Internet ignore the border. Tens of millions of cross-border visitors spread ideas and customs, as do hundreds of millions of transactions in all domains of North American life. The internal operations of General Motors make law for North America, as do the rules of the New York Stock Exchange. These hundreds of millions of formal and

informal agreements among citizens and firms are very much a part of North American law, although nobody could codify it or assemble it in one place.

These myriad entities and texts that make up the Canada-US relationship are, in effect, North America's informal, unwritten constitution and its associated conventions and practices. Moreover, that the institutions of North American integration involve the daily interactions of millions of people rather than the text of a single treaty does not mean that they are accidental or ad hoc. Lon Fuller (1955, 1322) wrote:

> Some of the most important and complex systems of order we know have come into existence, not by a single act of creation, but through the cumulative effect of countless purposive directions of human effort. Examples of such systems are language, economic markets, scientific theory, the common law, and on a homelier plane, a footpath through a woodland. These are sometimes referred to as cases of "spontaneous order," but this expression is objectionable in implying that they have come into existence without purposive human effort.

We can try to create structure, but the order comes from people choosing their own path through the crowded open spaces of North American collective life.

Swiss Army Knife Diplomacy

The reader who accepts my depiction of North American institutions may still wonder what the Canadian government should do about the apparent difficulties in Canada-US relations. Do the grand schemes have a point? The full answer is equally multifaceted, but let me sketch some implications in a traditional form.

In single-point diplomacy, state-to-state relations are the responsibility of ambassadors and foreign ministers. When Arnold Heeney was Canada's ambassador in Washington in the 1960s, it was highly unusual for foreign diplomats to talk to members of Congress. "Quiet diplomacy" was preferred, if at all possible, as Heeney and Livingston Merchant, a former US ambassador to Ottawa, argued in their 1964 report on managing the bilateral relationship. They saw their approach as more than normal diplomacy, but the basic principle was that quiet and regular consultation at all levels was better than loud confrontation. But that model of negotiations between central authorities could not be sustained when the US Congress and public became more assertive during the years of the Reagan administration (Holmes 1988). The changing nature of US politics required a new mode: the diplomat as public advocate.

No Canadian ambassador sought and received more attention for this role than Allan Gotlieb (see Cooper 1989). Gotlieb, a former under-secretary of state for External Affairs, was ambassador in Washington from 1981 to 1989 during the Reagan administration, serving both Pierre Trudeau (whose energy policy and peace initiative angered Reagan) and Brian Mulroney (whose economic liberalization policies were welcomed by Reagan).

In the introduction to his Washington memoir, Gotlieb constructs a stark contrast between the role of the diplomat in a traditional conception of politics in Washington and the reality he found. In the days of the "Imperial Presidency," it might have made sense to do official business only with the State Department and never to "interfere" in domestic matters. Fragmentation of power is not new under the US Constitution, but the assertive role of Congress in foreign relations after the Vietnam War and the decline of the power of political parties increased the extent of the fragmentation. No single point of power exists in Washington. In consequence, Gotleib says, "the ambassador to Washington is accredited neither to a government nor even to a system. He is accredited to an unstable mass of people, forces, and interests that are constantly shifting, aligning, and realigning in ways that can affect or damage the interests of the country he represents" (Gotlieb 1991, 30–31). This fragmentation is due not merely to the separation of powers. Rather, the nature of US political institutions has created a giant open-air policy bazaar populated by tens of thousands of lawyers, lobbyists, journalists and congressional staffers (32–33; see also Frazer 1998). And that is just inside the Beltway. Gotlieb's example of the difficulties of negotiating a comprehensive treaty is instructive of the pressures brought to bear from beyond the capital: The arduously negotiated East Coast fisheries treaty fell apart toward the end of the Carter administration because of the impact on one Senator of a few hundred fishermen in Rhode Island (Gotlieb 1991, 18ff).

More recent ambassadors will be able to write similar memoirs about the new diplomacy. Sometimes patient work is required in Washington. For example, technological change means that, for many firms, the Canadian market is not big enough

for efficient economies of scale, especially in the case of high-technology military goods, so access to the US market for Canadian firms in this industry is vital. In the 1990s, US security concerns began to limit the ability of foreigners to participate in US procurement contracts because of problems with access to the necessary information. Accordingly, restrictions under the International Traffic in Arms Regulations (ITAR) imposed in 1998 gravely affected Canada's defence equipment industry. Then Canadian foreign minister Lloyd Axworthy and then US secretary of state Madeleine Albright held talks between April and December 1999 that eventually led, in May 2001, to the introduction of special exemptions for Canada within the ITAR framework. It is hard to imagine that resort to a North American trade court, no matter how powerful, could have more quickly resolved an issue where Congress and the administration thought US security was at stake.

Sometimes ambassadors play a lesser role and the fragmented nature of the US political system can work to Canada's advantage, even in lessening apparently intractable US immigration rules. In one case, new residency rules for Canadian "snowbirds" threatened the traditional winter migration south, and Florida politicians, whose constituents saw their incomes put at risk by the possible absence of Canadian visitors, were eager allies. In another case, migratory students were being blocked, until Michigan, a state in which many Canadians attend university, weighed in. In both cases, Canadians got the rule changes they wanted.

The reverse is, of course, also true. When a minor disease afflicted one field of Prince Edward Island potatoes, Washington was tied in knots by Idaho, which had a huge surplus that year. Canadian officials were chagrined when they could not budge the Americans even using dispute settlement. Here, the institution concerned is a federal-level bilateral consultative committee on agriculture created to identify farm trade irritants in advance (see Canada 1999). The committee has an advisory group that includes state and provincial representatives as well as bilateral industry groups, and a process for describing the various mechanisms available for settling sanitary and phytosanitary disputes. The list of topics discussed at the committee's March 2002 meeting, indicative of the broad and detailed scope of its deliberations, included: the pending US Farm bill and bioterrorism legislation; problems in the potato trade; seed certification laboratory accreditation; the movement of horses into the United States; veterinary drugs; metric increments of institutional food package sizes; and an update on pesticide harmonization. This kind of detailed on-going consultation among the officials directly involved on both sides of the border may increase mutual understanding and help to avoid future disputes.

Power is everywhere in the United States, and no central institution can be created to manipulate it on Canada's behalf. The fragmentation in Washington does not apply merely to political control of the levers of power, it is in the nature of the levers themselves. Modern democracies, especially the United States, are not governed by centralized bureaucratic hierarchies. Salamon (2002) calls this phenomenon "the new governance": its defining characteristic, he says, is "third party government." The new tools involve the state in a host of collaborative ventures to provide public services. These arrangements enable different sorts of actors to influence how policy is made and, especially, implemented. The choice of tools determines the structure of the network, but the actors in the network will have widely differing skills and goals. Command-and-control techniques are less and less prevalent, replaced by negotiation and persuasion as the preferred means of setting and carrying out policy.

It is instructive to compare Gotlieb's account to another famous contribution to the extensive literature on the Canada-US relationship, that of Robert Keohane and Joseph Nye (1989, ch. 7). In their examination of bilateral issues from 1920 though the 1960s, Keohane and Nye separate four different analytic dimensions: systemic effects, regime effects, overall structure effects and things specific to the relations between two countries. Some of the factors they consider as explanations for Canada's relative success are: whether an issue could be classified as politico-military (security), diplomatic or socio-economic; whether it involved joint resource claims or competing sovereignty claims; whether transnational organizations or transgovernmental actors were involved; the locus of decision; whether the US government was split; and the relative cost or salience for the president. Gotlieb also considers some of these factors in his explanations of different patterns of embassy and administration activity on such issues as acid rain, free trade and Arctic sovereignty, situations where the administration supported, opposed or was ambivalent about the Canadian position (Gotlieb 1991, 95).

Gotlieb's reflections on the factors that affect diplomatic activity and success are really a discourse on the

nature of US politics and public administration. Given the political realities of Washington, he concludes, there are no grand strategies, only micro strategies for diplomatic action, because every issue will involve a different group of actors.[11] A foreign country is but a minor special interest, because it sends no one to Congress. It has no permanent friends or enemies in Washington. Though some will be generally well disposed, coalitions must always be built afresh. Accordingly, on any issue, Canada must find a US private sector ally with clout. Canadians have to remember that the congressman who is our friend on acid rain can be our enemy on border broadcasting; narrow producer interest groups trump broad consumer groups and potential allies may not have a direct interest in the issue. A former Canadian diplomat with long experience in New York and Washington argues that Canada succeeded on the acid rain issue in the early 1980s only because it waded into the issue as a special interest and played by US rules. We framed acid rain as an issue Americans had to solve for themselves as citizens and taxpayers. We lobbied and advertised. We engaged hunters, fishermen and hikers. We talked to anybody who would listen. We encouraged Canadian environmental groups to talk to their US counterparts. Provincial officials talked to their state counterparts. And the prime minister engaged directly with the president.[12]

I would not use Tom d'Aquino's image of the border as a "shared checkpoint," and I am dubious about his centralist conception of a border management commission (d'Aquino 2003). We do, however, have to think of ways to reassure Americans that no danger lurks in Canada. We have to be active participants in the defence of North America without compromising our own control of border and migration policies. D'Aquino is on the right track in suggesting that much of the real work of the border as a shared institution need not take place at the physical boundary. Food safety provides an analogy. The sophisticated Canadian food safety system involves all levels of government with business, industry associations, academics and civil society organizations. The Canadian Food Inspection Agency has integrated responsibility for plant and animal health as well as consumer safety. Rather than using older models of command-and-control regulation based on government inspectors, the agency is increasingly moving to a newer model of a farm-to-fork system in which everyone, from farmers to retail clerks, has a role to play. Inspectors audit the systems in place, rather than specific products (Prince 2000). In Swiss Army knife diplomacy, the border can be everywhere, and all of us can be involved in managing the relationship.

Part 3: "See You in Washington"?

Both opponents and supporters of closer integration must recognize that Canada shares a continent with the United States, and there is no cure for that. As Tom Courchene (2003) notes, we cannot pretend that the Canadian economy is not dependent on the US economy; as Kim Nossal (1989) points out, we cannot pretend that the United States will interpret its Constitution to suit us; and we must recognize that the institutions that exist suit the larger party in the relationship (Bélanger, forthcoming). Sharing a continent with the United States is, as Stephen Clarkson (2003) says, a burden as well as a privilege, but we do have choices.

Canadians naturally find it hard to ignore high-profile bilateral disputes such as softwood lumber. Yet looking at softwood is like looking at the sun: it blinds the observer to the rest of the universe of Canada-US relations. In fact, most of the world's biggest trade relationship does not give rise to formal disputes, and most disputes are not so intractable as softwood lumber has proven to be.

One reason softwood lumber has lasted so long is that the two sides do not agree on the basic rules. A dispute settlement system can only interpret trade rules; it cannot stretch the rules to resolve problems that eluded negotiators. It is one thing to ask a tribunal whether the agreed definition of "subsidy" applies to a given transaction; it is something else to expect a panel to construct a consensus definition on its own when the two sides cannot agree on how the market does or should operate. Nor would deeper integration necessarily help. Canada does not have a seamless market even in securities regulation, the Agreement on Internal Trade notwithstanding. Moreover, it is not clear to me that there is ever a seamless market in the United States. We need more research on the barriers that US states erect against trade with each other. Do forestry firms in British Columbia really want "national treatment" in the United States? What legal weapons would their competitors in Oregon deploy then? The US market is remarkably open, but it depends on courts and

administrative agencies to implement the commerce clause of the US Constitution. US firms have learned to manipulate the NAFTA dispute settlement system through long practice in their own country's courts.

Another analogy is to see softwood lumber as a chocolate bar that just keeps on getting bigger. Instead, we need to try to turn it (and future such problems) into a box of bite-sized candies. As it now stands, softwood lumber is a winner-takes-all dispute where all the small US mills band together to challenge all Canadian practices at once, as if the egregious Canadian practices are the responsibility of the Canadian federal government and require the US federal government to intervene. In such circumstances, US voters trump Canadian softwood lumber workers in Washington. If, however, the problem were broken into its constituent parts and individuals had to talk to each other about their complaints instead of using their governments as megaphones, perhaps it would be possible to accommodate differing regulatory ideas. The current system provides no good way for resolving intractable trade remedy conflicts when private interests can push the US government into trying to dictate Canadian forest management practices. Creating an even bigger version of the current system will not solve the problems.

The Big Ideas now being proposed inherently require bundling Canada-US relations into one package. Kim Nossal argues (1989) that since Canada can negotiate as a singularity, it should push the United States to do the same. In the face of the changed post-9/11 context, therefore, instead of entering the US political debate with a Congress that was designed to be parochial, Canada should use traditional diplomacy to try to get the Bush administration to balance competing domestic and foreign interests. Canadians do not vote in US elections, and nothing we can say in the political arena will make much difference. No attempt to demand exemptions for "Canada" by whining will work; we will make progress only when the administration sees a national purpose being served. Millions of daily interactions have political consequences. Americans, especially those from northern states, deal with Canadians all the time, but there is no reason to think that they know much about "Canada" as an abstraction. And what they know, they may not like, since the point of Canada has always been that it is not American. When everything is bundled together, nothing is agreed until everything is agreed. Meeting that objective requires getting more Americans to the table, and agreed, than Canadians can manage, because it requires us to do deals in areas where neither Canada alone, nor even all foreigners together, are the major factor in US decisions.

I argue, instead, for what I call "Swiss Army knife diplomacy." We should not treat the United States as a single point, nor should we try to put all Canada-US relations on an Ottawa–Washington axis. In 1991, Allan Gotlieb advocated, in addition to active and public diplomacy, what he called the "multiplicity-of-instruments" doctrine (1991, 117–18). By this he meant a policy of encouraging Canadian officials, legislators, politicians, businessmen, lobbyists and others from all levels of Canadian life to be active participants in the kaleidoscopic effort to defend Canadian interests in the United States. The House of Commons Foreign Affairs Committee agrees (see Canada 2002, 226ff). And it too stresses, in its call for increased diplomatic resources in the United States, the co-ordinating role of the Canadian Embassy in building alliances between Canadians and their US counterparts.

The North American constitution does not need fixing. Instead, I have suggested a view of governance that does not assume that all rules come from the state, that all rules take written form and that only one form of authority is present at any one time. In the pluralist model, North Americans are governed by many rules that do not come from central state organs, many rules are not written down and many sites of authority can operate for the same people at the same time. When the only institution we can imagine is adjudication, we limit the way in which we can understand the problem, the scope of participation and the types of possible outcomes.

Perhaps the Big Ideas simply go too far, rather than not far enough. When the sovereignist Parti Québécois was first elected in 1976, the Montreal *Gazette* published a wonderful cartoon by Aislin showing the party's leader, René Levesque, cigarette in hand, saying "OK, everybody take a valium." The implied voice, however, was that of the anglophone cartoonist, not the sovereignist leader he portrayed. More than a quarter of a century later, we know that the election of the PQ was an important step in the long evolution of our efforts to elaborate Canadian institutions, but it did not presage radical transformation. We should similarly hesitate before rushing to embrace radical proposals for institutional change in the North American context. I do not mean that we should do nothing, only that we should not change course. What we have works. Canadians and Americans do not fight shooting wars.

Tens of millions of people go back and forth across the border every year. We have the largest trading relationship in the world. We manage most externalities associated with physical proximity and economic integration. Even within Canada, talking about whether we can change institutions takes time, as we have learned. Recall the last referendum debate, when the rest of Canada was not too keen on the idea that Quebec wanted *both* sovereignty *and* some common institutions in which it would have parity with the rest of the country. It is hard to imagine a strong North American institution that the United States would not dominate.

Canadians worry a great deal about how to deal with US power and that country's apparent threat to our sovereignty. When we allow our thinking to be "trapped in North America," as Arthurs (1999) puts it, we think that the only challenge to our sovereignty is the world's hegemon, our neighbour (Clarkson 2002). But the United States, too, is subject to many sources of power and law. Even when one party to an exchange appears to have disproportionate command of material resources, such as a large company's relations with small suppliers, the stronger party cannot manipulate the rules at will.[9] Strong states may lead or even act alone, but they find it hard to command.

If democracy means participating in decisions that affect one's life, and if Canadians do not want or cannot have representatives in the US government in Washington, we need to think of our relations with the United States in terms of hosts of small institutional settings where people can work together to solve problems without invoking state formality. The Holy Grail for Canadian exporters has been some mechanism to prevent US competitors from using trade remedy laws to harass Canadian firms. No single tool can fulfill this hero's mission, but there are many small ones that might work. We do not have to accept that US power will determine all outcomes, and we should not be seduced by people who believe that formal adjudication alone will solve all disputes.

The proponents of Big Ideas are, in any case, less than clear on which "Canada" they have in mind. We need to distinguish the Canada that wants to be rich from the Canada that wants its own administrative law traditions. Governance is what we all do, and we have interests as Canadians, not just as consumers and producers. Analysts should avoid the temptation to say "we" will benefit from a policy of deeper integration with the United States when their desired outcome is merely reduced transaction costs for business. Many Canadians hold other values more dearly. To be clear: I am not counseling inaction; rather, I am arguing that Canadians, be they private citizens or prime ministers, should be using all the institutions of North American integration that already exist, whether formal or the ones created in the course of the millions of daily interactions of Canadians and Americans. We must not be complacent, but we do not need to bundle everything into one framework. Rather than seeing North American institutions only in Washington or only on an ambassadorial bridge from Washington to Ottawa, we can see them everywhere.

Notes

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1 For the original use of these metaphors, see Macdonald (2001; 2002*a*; 2002*b*).

2 For a description of the extent of North American integration, see Canada (2002); for a detailed analysis of the significance for US states and regions of trade with Canada, see Canada (2001).

3 Some of these labels were suggested by George Haynal, a former senior Canadian diplomat in the United States and now Vice President of the Canadian Council of Senior Executives, in a talk at Queen's University on January 8, 2003.

4 On the tension between dealing multilaterally and bilaterally in North America, see Diebold (1988).

5 This ambiguous term seems to mean increasing the scope and depth of NAFTA commitments by, for example, including immigration (a Mexican idea) and developing more extensive common rules.

6 This paragraph depends on a theory of regulation that I have developed elsewhere; see Wolfe (1999; 2001).

7 For a description of NAFTA institutions, including its dispute settlement mechanisms, see de Mestral (2000, ch. 4), McKinney (2000). On Chapter 11, see Mann (2001) and on Chapter 19, see Winham (1998). For a useful review of experience with NAFTA dispute settlement, see Canada (2002).

8 I develop this argument at greater length in Wolfe (2002).

9 This history was surveyed for the Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission) in the early 1980s; see Stairs and Winham (1985). On the long history of Canada's preoccupation with this topic, see also Hoberg (2000).

10 For discussions of this phenomenon, see Swanson (1978); Willoughby (1979).

11 See http://www.state.gov/www/global/legal_affairs/tifindex.html; http://www.state.gov/www/regions/wha/uscanmex_trilat/inventory.html

12 Portions of the Heeney-Merchant Report can be found in Granatstein (1986). For an analysis of the report, see Holmes (1970); for the views of a principal, see Heeney (1972).

13 This is an observation that Gotlieb himself appears to contradict in his more recent writing — see Gotlieb (2002). In my view, he got it right the first time.

14 Paul Frazer, personal communication, February 4, 2003.

15 Jutras (2001) uses work by Belley (1998) and Reisman (1999) to show how this reality operates at all levels of social life. Keohane and Nye (1989) show how it operates in interstate relations, at least in North America.

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IRPP

Rendez-vous à Washington ?

Un point de vue pluraliste sur les institutions nord-américaines

par Robert Wolfe

Le Canada est certes privilégié de partager le même continent que les États-Unis, soutient Robert Wolfe. Mais aussi inéluctable que soit cette réalité économique et géographique, ses conséquences politiques ne sont pas prédéterminées. Même s'ils sont préoccupés par ce qui les distingue de leurs voisins du Sud, les Canadiens s'évertuent à saisir chaque occasion de profiter de leur vaste marché et sont fascinés par le vibrant spectacle de la vie culturelle américaine. Ils dépendent au reste de l'aide des Américains pour la défense du continent partagé, mais s'inquiètent d'être mêlés à des conflits jugés étrangers à leurs intérêts. Depuis le XIX^e^ siècle, nos deux pays n'ont cessé de parapher des traités et de créer des organismes pour gérer la complexité de leurs relations. Mais dans la foulée des événements du 11 septembre 2001, universitaires de renom, gens d'affaires et anciens ambassadeurs ne se sont pas moins inquiétés de l'apparente faiblesse des institutions nord-américaines : le Canada dépendrait plus que jamais des États-Unis, lesquels seraient cependant moins intéressés que jamais à tenir compte de l'opinion d'autres pays. Une indifférence apparente qu'aucun mécanisme institutionnel ne semble en mesure d'entamer.

Robert Wolfe oppose à cette vision un argument très simple. Si nos deux pays se dotaient d'une grande institution commune, celle-ci aurait son siège à Washington. Or le Canada doit son existence à son refus de considérer Washington comme un centre de décision collective. À moins que nous ayons changé d'avis, nous ne devrions pas envisager la création d'une nouvelle institution de cette ampleur. Nous devrions plutôt nous tourner vers les institutions que nous avons déjà en commun et nous baser sur elles. La première partie de ce texte décrit ainsi le problème qui semble se poser et résume les inquiétudes concernant les institutions nord-américaines actuelles. En deuxième partie, l'auteur propose une série de métaphores visant à identifier ces entités informelles et soumet leur crédibilité à quelques tests empiriques. Il conclut en tirant de l'exercice quelques perspectives sur les politiques à suivre.

Dans l'Amérique du Nord de l'après-11 septembre, le Canada fait face à de nouveaux enjeux en matière d'économie et de sécurité mais sa population souhaite le maintien d'une véritable frontière. Tout comme les Américains, dont on ne saurait s'attendre qu'ils acceptent de modifier le système de règlement des conflits de l'ALENA pour soustraire les entreprises canadiennes aux tracasseries juridiques infligées à quiconque fait des affaires aux États-Unis. Ces derniers mois, on a beaucoup discuté en haut lieu des grands schémas d'une intégration nord-américaine plus poussée et de la nécessité pour le Canada d'offrir davantage aux Américains s'ils souhaitent s'intégrer à ce « périmètre ». Les adeptes de cette vision semblent croire que nous ne pouvons traiter avec les États-Unis qu'en concentrant tous les aspects de nos relations communes au sein d'un cadre centralisateur. Pourtant, soutient Robert Wolfe, les institutions pluralistes que nous possédons déjà conviennent parfaitement à nos deux pays.

Ces grands schémas ont trouvé une expression symbolique en septembre 2002, lorsque le pont Ambassador reliant Détroit et Windsor a servi de toile de fond à la signature du *Smart Border Accord* par le président américain et le premier ministre canadien. Ce pont majestueux a pu faire rêver certains d'une arche constitutionnelle qui donnerait aux relations canado-américaines un seul et robuste cadre d'État à État, accompagné d'un même ensemble d'outils politiques cohérents. Ce cadre symbolique offre pourtant une image trompeuse de notre avenir commun.

Plutôt que des arches d'un pont en guise de métaphore constitutionnelle, l'auteur suggère l'image d'un *kaléidoscope* aux formes et aux couleurs toujours changeantes, à l'exemple justement de bon nombre de nos institutions communes. Les textes juridiques traduisant le mode de vie nord-américain ne pouvant donc être regroupés en un document général, il y ajoute cette autre image d'une *porte de réfrigérateur* sur laquelle chacun aimante à l'intention de tous les messages témoignant d'un engagement à vivre ensemble. Par contraste avec la photo des deux chefs d'État signant un seul accord visant à résoudre tous leurs problèmes politiques, il offre enfin l'image d'un *couteau suisse* qui intègre une multitude d'outils s'adaptant à l'infini aux besoins de millions d'utilisateurs. Suivant cette « diplomatie du couteau suisse », les relations canado-américaines deviennent la responsabilité de tous et non seulement des chefs de gouvernement. Car si le Canada doit éviter de faire du sur place, conclut Robert Wolfe, il n'a aucunement besoin de tout faire entrer dans un même cadre. Il ne faut pas chercher les institutions nord-américaines uniquement à Washington ou sur un pont diplomatique reliant la capitale américaine à Ottawa. Elles sont plutôt partout où on veut bien les trouver.

Résumé

Summary

Robert Wolfe contends that while Canada is privileged to be condemned to share a continent with the United States of America, this geographic and economic reality does not have predetermined political implications. Canadians strive to grasp the opportunities of participating in the vast US market, and are tempted by the vibrant spectacle of US cultural life, though they worry about their own distinctiveness. Canadians depend on the Americans' help for the defence of a shared continent, but worry about being dragged into conflicts they perceive as foreign. Since the eighteenth century, Canada and the United States have been drafting treaties and creating organizations to manage the complexities of this relationship. In the aftermath of the shock of 9/11, however, prominent academics, business leaders and former ambassadors have been worried about the apparent weaknesses of North American institutions. Canada is more dependent on the United States than ever before, they contend, but Americans are less interested than ever in taking account of other countries' views, and no institutional mechanisms are available to override this perceived deafness.

Wolfe presents a simple argument. If Canada and the United States had a strong common institution, it would be located in Washington. Canada exists because we have not wanted to look to Washington as the locus of collective decision. Unless Canadians have changed their minds, we should not now seek a new overarching institution. Instead, we should seek both to recognize and to build on the robust institutions we already share. Part 1 of this paper describes the problem we seem to face and sketches the current concerns about North American institutions. In Part 2, Wolfe suggests a series of metaphors as an aid to recognizing these informal entities, and he offers some empirical tests of their plausibility. The last section draws some policy implications.

Canada faces new economic and security challenges in the changed circumstances of post-9/11 North America, but Canadians want to retain a real border. So do Americans, who are unlikely to agree to changes in the NAFTA dispute settlement system that would exempt Canadian firms from the normal legal harassment suffered by anyone doing business in the United States. The grand schemes that have been attracting considerable elite attention in recent months are usually based on the idea that more North American integration is needed, and that Canada can get inside the "perimeter" only if it puts enough on the table to get the United States' attention. Proponents appear to believe that we can deal with the United States only by concentrating all aspects of our relations with that country in one centralist framework. But, says Wolfe, existing pluralist institutions suit both countries.

The framework for the grand schemes took symbolic form when the Ambassador Bridge between Detroit and Windsor was used as a backdrop for the signing of the Smart Border Accord by the US president and the Canadian prime minister in September 2002. With the soaring bridge in mind, it was possible to dream of an overarching constitution in which the relations of Canadians and Americans can be subsumed in a strong state-to-state framework with a single set of coherent policy tools. This concrete framework is, however, a misleading image of our shared future.

Instead of the overarching bridge as a constitutional metaphor, Wolfe suggests a kaleidoscope, with its constantly shifting shapes and colours, just like our many shared institutions. It follows that the important legal texts of North American life are not to be found in one comprehensive treaty, and so he suggests the image of a fridge door, the place where everyone posts the relevant textual evidence of mutual commitments for all to see. In contrast to the image of a single document signed by two leaders solving all policy problems, he suggests a Swiss Army knife: not a single tool nor even the same tool for every person, but a collection of tools infinitely adaptable to the purposes of millions of users. In Swiss knife diplomacy, Canada-US relations are everyone's responsibility, not just the prime minister's. Wolfe concludes that Canadians must not be complacent, but we do not need to bundle everything into one framework. Rather than seeing North American institutions only in Washington or only on an ambassadorial bridge from Washington to Ottawa, we should look for them everywhere.